SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Assoun*, 2014 NSSC 419

Date: 2014-11-24
Docket: *Halifax*, No. CRH 149825
Registry: Halifax

Between:

Glen Eugene Assoun

Applicant

and

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice James L. Chipman
Heard:	November 24, 2014, in Halifax, Nova Scotia
Oral Decision:	November 24, 2014
Counsel:	James Lockyer , Philip Campbell and Sean MacDonald, for the Applicant, Marian V. Fortune-Stone, Q.C. and Mark Scott, for the Respondent
Subject:	Common law and *Charter of rights and Freedoms* judicial interim release hearing.
Summary:	Applicant, with the consent of the Respondent, sought judicial interim release pursuant to part XXI.1 of the *Criminal Code* on the basis that there may have been a miscarriage of justice in respect of his original conviction.
Issue:	Did the joint recommendation satisfy the preconditions of *Criminal Code* s. 679(3) and (7).
Result:	Applicant granted judicial interim release on the basis of a

joint recommendation with the terms of *Criminal Code* s. 679(3) and (7) having been satisfied.

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Editorial Notice:	Identifying information has been removed from this electronic version of the judgment. Consistent with the oral decision, redactions appear throughout the Order (pp. 10-17) pursuant to a (partial) publication ban and sealing order.

Orally by the Court:

Introduction

[1] Just over fifteen years ago in this same Court House a jury returned a verdict convicting Glen Eugene Assoun of the second degree murder of Brenda Way. The sentence that followed was for life imprisonment with no parole eligibility for eighteen and a half years. How is it then, that we today find ourselves in the Supreme Court of Nova Scotia considering bail for Mr. Assoun? I will explain.

[2] In the nineteen years since Brenda Way's murder, Glen Assoun has steadfastly maintained his innocence. He appealed his conviction but the appeal was dismissed by our Court of Appeal in the spring of 2006. In the late summer of that year, his application for leave to appeal to the Supreme Court of Canada was dismissed.

[3] Mr. Assoun's case was subsequently investigated by the Association in Defence of the Wrongly Convicted ("AIDWYC"). AIDWYC took the matter on as what they term a case of factual innocence on September 23, 2010. On April 18, 2013 AIDWYC submitted an application on behalf of Mr. Assoun to the Federal Minister of Justice. The application was made in accordance with Part XXI.1 of the *Criminal Code*. The regulations under this part of the *Code* set out the mechanism for how the Minister considers such an application. Accordingly the Minister's Criminal Conviction Review Group ("CCRG") conducted a preliminary assessment of Mr. Assoun's application to determine whether there (in the words set out in the regulations) "… *may* be a reasonable basis to conclude a miscarriage of justice likely occurred" (emphasis added). In early September of this year, the CCRG released their 82 page preliminary assessment (to counsel under a strict nondisclosure undertaking). The author of the preliminary assessment, Department of Justice Canada lawyer Mark Green concluded:

> "… I am of the view that on the basis of all this information, including the new and significant information that has been submitted with your application, there may be a reasonable basis to conclude that a miscarriage of justice likely occurred in your case. Therefore, your application will advance to the Investigation stage of the criminal conviction review process."

[4] In the result, Mr. Assoun's case is now being investigated by the CCRG. If, on completion of the investigation the Minister's view is that there "… *is* a reasonable basis to conclude a miscarriage of justice likely occurred" (emphasis added) he may grant one of two forms of relief:

1) order a new trial (which has the effect of vacating the conviction); or

2) refer the case to the Nova Scotia Court of Appeal.

[5] From the affidavit evidence detailing previous wrongful conviction investigations, I have no hesitation in stating that it has been shown these investigations take in the order of several years to complete. Returning to the specifics of Mr. Assoun's situation, it is therefore conceivable that he will be eligible for parole by the time the investigation of his case is completed.

[6] Given that the preliminary assessment calls into question the integrity of Mr. Assoun's conviction, there is a constitutionally based entitlement for Mr. Assoun to apply, as he has here, for judicial interim release. As I noted in my decision. *R. v. Assoun*, 2014 NSSC 381, ordering a publication ban and sealing order in this case:

> [46] At the outset, it is important to delineate the nature of the judicial interim release hearing scheduled to occur next month. The parties agree, as I find, that we are not dealing with a statutory (s. 517) [s. 515-529]bail hearing. Rather, the Court has jurisdiction to hear the application under the Charter and the common law. This is consistent with the initial decision on an application for release under Part XXI.1, *R. v. Phillion*, [2003] O.J. No. 3422 (Ont. Sup. Ct. of Just.), a decision of Watt, J (as he then was). As Justice Beard noted in *R. v. Unger*, 2005 MBQB 238, at para 9 (speaking of Justice Watt's decision):
>
> > He found that, notwithstanding the lack of statutory authority to apply for release prior to a decision or reference following an investigation, the Court has jurisdiction to hear the application under the Charter of Rights and Freedoms and the common law. That decision was not appealed, and the jurisdiction of the court to hear an application for release at that stage was accepted by

> the crown in Manitoba in *R. v. Driskell*, 2004 MBQB 3 and in the present matter.
>
> [47] Whereas the CBC says that a statutory mandatory publication ban is "very different" from a discretionary, common law publication ban, I respectfully disagree. Rather, I adopt the argument of Assoun that we are dealing with a very similar context. In my view this judicial interim release hearing should proceed with both the best interests of the potentially wrongfully convicted and the public in mind.

[7] With the above interests in mind, I have carefully considered the bail application brought forward today. I know from what has been stated in court today and on the basis of two previous telephone conferences with counsel that much work has gone into the proposed Order, to which the parties have consented.

Jurisdiction to Order Judicial Interim Release

[8] Subsequent to *R. v. Phillion*, *supra*, there have been four cases which have determined that a superior court has jurisdiction to grant bail under Part XXI.1 of the *Criminal Code*:

> *R. v. Driskell*, [2004] 179 Man. R. (2d) 276 (Q.B.)
> *R. v. Mullins-Johnson*; released on consent before Watt J. in the Ontario Superior Court on September 21, 2005
> *R. v. Unger*, [2005] 196 Man. R. (2d) 280 (Q.B.)
> *R. v. Ostrowski*, 2009 MBQB 327 (CanLII)

[9] Regulations proclaimed pursuant to Part XXI.1 prescribe the manner in which applications must be brought, and the steps to be taken by the Minister. Sections 3 and 4 of the regulations create a two-stage process:

> 3. On receipt of an application completed in accordance with section 2, *the Minister shall*
>
> (a) send an acknowledgement letter to the applicant and the person acting on the applicant's behalf, if any; and
>
> (b) *conduct a preliminary assessment of the application*.

> 4. (1) After the preliminary assessment has been completed, the Minister
>
> (a) *shall conduct an investigation in respect of the application if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred*; or
>
> (b) shall not conduct an investigation if the Minister
>
> (i) is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred and that there is an urgent need for a decision to be made under paragraph 696.3(3)(a) of the Code for humanitarian reasons or to avoid a blatant continued prejudice to the applicant, or
>
> (ii) is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred. (emphasis added).
>
> *Regulations Respecting Applications for Ministerial Review - Miscarriages of Justice,* SOR/2002-416.

[10] The authorities characterize the Minister's decision that a full investigation should be conducted because a miscarriage of justice *may* have occurred as an important basis for granting of bail. Indeed, I agree with Justice Suche's remarks in *R. v. Ostrowski*, *supra* at paras 18-21:

> [18] Although there is no statutory basis for an application for release at this stage of the proceedings, the case of *R. v. Phillion*, [2003] O.J. No. 3422 (Ont. Sup. Ct. of Jus.) (QL), established that the court has jurisdiction to grant release, and that is not disputed here.
>
> [19] *Phillion* also determined that the preconditions in s. 679(3) of the Criminal Code governing bail pending an appeal, apply at this stage of the proceedings. They are:
>
> (a) the application is not frivolous;

> (b) the applicant will surrender himself into custody according to the terms of the order; and
> (c) the applicant's detention is not necessary in the public interest.

> [20] As noted by Watt J. in *Phillion*, an application is not frivolous if it is arguable. Thus, an applicant need not establish actual or near certainty of success but should be able to demonstrate there are serious concerns about the accuracy of the verdict because of further information.

> [21] I also agree with the view expressed in *Phillion*, that the very fact that the Minister has determined at the preliminary assessment that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred, suggests that there is an arguable case.

The Test for Release After the Preliminary Assessment

[11] As noted above, Mr. Assoun's release is to be decided pursuant to *Criminal Code* s. 679(3) which sets out three preconditions. Further, s. 679(7) governs and reads as follows:

> "If, with respect to any person, the Minister of Justice gives a direction or makes a reference under section 696.3, this section applies to the release or detention of that person pending the hearing and determination of the reference as though that person were an appellant in an appeal described in paragraph (1)(a)."

[12] Given s. 679(7), the same judicial principles apply as when an application for release pending appeal is made. The presumption of innocence has been displaced with Mr. Assoun's conviction by the jury on September 17, 1999 and that conviction having been subsequently upheld on appeal. Therefore, Mr. Assoun bears the burden, on a balance of probabilities, of showing that he should be released pending completion of the Ministerial review.

[13] In *R. v. Barry*, 2004 NSCA 126, Justice Fichaud held at paragraph 8:

> "Mr. Barry has the onus to establish each of the three conditions stated by s. 679(3). The conviction has substituted his initial presumption of innocence with a status quo of guilt. Unlike a pre-trial

> bail applicant, a convicted appellant "seeks to reverse the status quo by obtaining a reprieve from a court order for his detention following conviction" and, therefore, has the burden to prove the conditions for release pending determination of the appeal: *R. v. Branco* (1993), 87 C.C.C. (3d) 71 (B.C.C.A.), at p. 75 per Finch, J.A.; *R. v. Butler*, [1997] N.S.N. No. 391 at paras. 4-5; *R. v. Ryan*, [2004] N.S.J. No. 332, 2004 NSCA 105 at paras. 2-3."

[14] Given the conclusion of the preliminary assessment and the fact that the Ministerial review has moved on to the investigative stage, the Respondent acknowledges, and I have no difficulty in finding, that this aspect of the test has been satisfied.

[15] Next, I must consider whether Mr. Assoun will surrender into custody. In this regard, I have reviewed Mr. Assoun's criminal record as set out in his affidavit and clarified by the Respondent in their brief. As the Respondent goes on to point out, there are factors which can provide some assurance that Mr. Assoun will surrender himself into custody as directed by this Court, including the following:

> (a) Mr. Assoun has a continued interest in the Ministerial review process and a significant stake in its outcome. He has proposed residing in a community within which he has connections; and
>
> (b) considerable time has passed since the convictions were entered, and these convictions did not arise in relation to his murder charge.

[16] Finally, I must consider the release plan in the context of the third part of section 679(3), that Mr. Assoun's detention is not necessary in the public interest.

[17] Section 679(3)(c) requires a balancing of divergent criteria in the unique circumstances of the case (*R. v. Barry, supra*, para 10; *R. v. Tattrie*, 2007 NSCA 41, para 14).

[18] In *R. v. McCormick*, 2012 NSCA 58, Justice Beveridge considered release pending appeal of conviction by a jury. Beveridge J. enumerated the factors to be examined when considering whether release would be in the public interest:

> [33] The competing interests at play in assessing public interest has been the subject of considerable judicial comment. In Nova Scotia it is accepted that a judge must be concerned about a number of factors

> in assessing "public interest", chiefly in terms of public safety, in the sense of what is the likelihood of the appellant committing further offences or posing a danger to himself of others if released. But also, what would be the potential impact on the public's perception of the administration of justice if the appellant was required to remain in custody or is released.
>
> [34] A judge hearing an application for bail pending appeal must balance a number of factors. The need to carry out this exercise was described by Cromwell J.A., as he then was in *R. v. Ryan*, 2004 NSCA 105:
>
> > [21] I agree with former Chief Justice McEachern when he wrote in *R. v. Nugyen* (1997), 1997 CanLII 10835 (BC CA), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind.
> >
> > …….
>
> [36] In my opinion, the factors that should be considered in carrying out this analysis are the circumstances of the offence, as far as they are known, the circumstances of the offender, the seriousness of the offence, and the degree to which the public can feel protected by appropriate terms of release and the apparent strength of the grounds of appeal and hence the risk of possibly unwarranted deprivation of liberty should release not be granted.

[19] In the usual release pending appeal motions under s. 679(3)(c), assessing the strength of the grounds of appeal of conviction is done by the court that will ultimately adjudicate upon those very grounds of appeal. In this case, the trial court has acquired jurisdiction because a legislative gap exists. In any case, the Respondent urges caution in this court, as follows:

> "On the strength of the grounds factor, the Respondent respectfully suggests that this Honourable Court proceed cautiously before accepting an invitation to decide upon issues that would pre-judge the potential findings of the Minister at the next stage of his review, or

> within other judicial forums. It would be premature and unfair to expect this Court to enter into that arena and would divert the Court into making evidentiary decisions that need not be made at this stage."

[20] By contrast, the Applicant put forward the following:

> "It is submitted that, barring cases where DNA evidence establishes that a convicted defendant is innocent as a matter of scientific fact, this is perhaps the strongest case for post-conviction relief in the reported authorities."

[21] For the purposes of adjudicating bail, the parties' competing views need not be directly addressed. In any event, the Court has been provided with a joint recommendation on judicial interim release. As stated by the Attorney General of Nova Scotia at paragraph 74 of their submission:

> "After considerable thought, the Respondent's position is that the public confidence in the administration of justice and public safety could be met if a sufficiently robust and stringent release plan is carefully crafted with conditions that balance the significant interests at play. Such a plan must take into account the reality that the Applicant would face reintegration difficulties. Successful release back into mainstream society can only occur if and when the necessary supports are in place."

[22] In my view, the proposed form of Order has been crafted after a great deal of thought by very experienced and capable counsel. The Court takes comfort in this, along with the fact that Mr. Assoun has supportive family members willing to have him reside with them. Furthermore, Corrections Canada officials have provided information about Mr. Assoun and they reasonably believe that he is not a risk to himself and the public. With this in mind, I will now read into the record the complete Order, with redactions to keep confidential the precise addresses in question.

Order

THIS MOTION for an Order releasing the Applicant, Glen Eugene Assoun, from custody pending the determination of his Application to the Minister of Justice (Canada) for review of his conviction for the murder of Brenda Way was heard in Chambers at The Law Courts, Halifax, Nova Scotia, on the 24th day of November, 2014;

UPON READING the material filed by the Applicant and the Respondent;

AND UPON HEARING Philip Campbell, counsel for the Applicant and Marian Fortune-Stone, QC and Mark Scott, counsel for the Respondent;

UPON BEING SATISFIED that the requirements of s.679 (3) of the *Criminal Code* have been met;

AND UPON BEING SATISFIED that the proper administration of justice requires that an Order should issue releasing the Applicant, Glen Eugene Assoun, pending completion of a Ministerial review being conducted pursuant to Part XXI.1 of the *Criminal Code;*

IT IS HEREBY ORDERED THAT:

(1) The current Warrant of Committal for the Applicant, Glen Eugene Assoun, is suspended, and the Applicant shall be released from […] custody […] upon entering into a Recognizance in Form 32 before a Justice or Judge in the amount of two hundred thousand dollars ($200,000.00), with two (2) sureties to justify in that amount, without deposit, and on the following conditions:

(a) he keep the peace and be of good behaviour;

(b) he deposit forthwith with the Prothonotary of this Court any passport he now has and shall not apply for a passport;

(c) Glen Eugene Assoun be released on his own recognizance of $5,000.00;

(d) Brenda Williams and Kevin Assoun, each sign as surety for $200,000.00, with their liability being joint and several;

(e) he is to be released only into the custody of Brenda Williams and Kevin Assoun and remain in the presence of at least one surety upon his

departure in Halifax, Nova Scotia, until he arrives in his community of residence, and has had his first meeting with his bail supervisor;

(f) upon Glen Assoun's release, he will be bound by the conditions of this Order. He must depart by air on Wednesday, November 26, 2014 from Halifax, […]without stays enroute subject to unforeseen delays in flight schedules. Until that time, he must be in the presence of a surety or his lawyer and reside at a designated hotel. From 10 pm to 8 am, he must remain in his hotel room which is the only timeframe within which he is permitted to be alone, that is, not in the presence of a surety or his lawyer. During those hours, he is not permitted to make or receive any phone calls at the hotel or from a mobile device except for the purpose of calling 911 in the event of his having a medical emergency.

(g) until Glen Assoun departs Halifax, he must remain at his designated hotel except:

(i) if emergency medical care requires his attendance at a hospital;

(ii) if his flight departure schedule requires him to leave the designated hotel before 8a.m., he must travel by the most direct route from the hotel to the Halifax Stanfield International Airport for his flight to his community of residence;

(iii) when he attends at the residence of a family member in the company of at least one surety, and must travel directly to and from that residence […] and must be in his hotel room by 10 p.m.;

(iv) between 8 a.m. and 10 p.m., he shall remain within specified Halifax Regional Municipality geographic street boundaries: […]

(h) he reside with Brenda Williams and Kevin Assoun, at their primary place of residence, […] and that he not reside elsewhere unless a judge of this Court has first given him permission to move from that primary place of residence;

(i) he must report to the bail supervision office at his community of residence between 8:30 a.m. and 4:30 p.m., excluding weekends, no later than 24 hours after he arrives in his community of residence, provided only that there is an unforeseen delay by the airline that he is traveling with or by

an airport authority. If such an unforeseen delay results and he arrives at his destination on a Friday or a weekend, he will report on the next following Monday; after the first meeting, he must meet with his bail supervisor as ordered by the bail supervisor, but no less frequently than once per week on the day and at the time specified by the bail supervisor;

(j) he provides his bail supervisor with the number for any telephone at the primary place of residence as described in clause 1 (h) and the number of any mobile device that he may have in his possession and to which he has access as well as any vehicle descriptions, including trailers, to which he may have access;

(k) he must also report to the RCM Police, […] in person within 48 hours of his arrival in his community of residence, and he must report thereafter in person or by telephone at least once per week, at a time to be arranged with the RCM Police;

(l) he must not leave his Province of residence unless a judge of this Court has first given him permission to leave, except for the purposes of travelling to Nova Scotia for court appearances related specifically to his section 696.1 application for Ministerial review, and such travel must be by the most direct route and in the company of at least one surety;

(m) if he is travelling to or from Nova Scotia for court appearances, he shall notify his bail supervisor and the RCM Police […] within 48 hours of his scheduled departure and return dates, his contact information and of his accommodations while in Nova Scotia, and shall continue to be bound by the conditions of this Order. Upon the bail supervisor and RCMP being notified, they will adjust his reporting conditions […] to direct him to report once per week in person or by telephone to the Halifax Regional Police Service at 1975 Gottingen Street, Halifax, N.S. Within 24 hours of his return to his community of residence, he shall resume reporting as required by clause 1 (i) to the bail supervisor and clause 1 (k) to the RCM Police. If he returns from Nova Scotia on a Friday or a weekend day only, he is to notify the bail supervisor and the RCM Police of his return […] by noon on the Monday immediately following his return.

(n) he must be subject to an electronic monitoring program provided by Recovery Science Corporation for which he has been approved, and ensure that the costs associated with the program are paid as required;

(o) he must attend, cooperate with and complete any psychological assessment, treatment program and/or counselling with Forensic Psychiatric Services as directed by his bail supervisor;

(p) he must immediately report to his bail supervisor all intimate sexual and non-sexual relationships and friendships with females, except for immediate family members;

(q) "intimate non-sexual relationships and friendships" is defined as any relationship with a female with whom Glen Assoun spends time for longer than 30 minutes on at least one occasion per week, and is not his bail supervisor, psychologist, counsellor, or other person who he is directed to report to for the purpose of complying with this Order;

(r) he must not have at the primary place of residence as described in clause 1 (h) any females unless one of his sureties is present other than immediate family members, or a series of named persons: (the named persons follow) […]

(s) if he has access to a camper trailer, trailer or other mobile type vehicle equipped for occupancy then he must be alone or in the presence of a surety, abide by the conditions of this Order and between 10 p.m. and 6 a.m. he must be in the primary place of residence as described in clause 1 (h);

(t) he must not possess or consume alcohol;

(u) he is prohibited from attending any place that sells alcohol as its primary mode of business;

(v) he is not to consume, purchase or possess any drug as defined in the **Controlled Drugs and Substances Act**, except prescribed medications taken as prescribed to him, and over the counter medications taken as recommended by the manufacturer;

(w) he must be in the primary place of residence, as described in clause 1 (h), by 10:00 p.m. and he must remain in that residence until 6:00 a.m. the

next morning, each and every day, except in the case of a medical emergency involving him or a member of the immediate family or if he has obtained prior approval from his bail supervisor;

(x) he must come to the door of the primary place of residence, as described in clause 1 (h) or answer the telephone of that residence if the bail supervisor, the RCMP or their designate conducts a curfew search;

(y) he must not own, possess or carry any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, and he must not own or possess or carry any other weapon, which includes any knife except for immediate preparation or consumption of food;

(z) he must not contact or communicate, either directly or indirectly, with any member of the Way family;

(aa) he must not contact or communicate either directly or indirectly with any current or former inmates of any federal penitentiary whom he came to know through his imprisonment on this offence;

(bb) he must not contact or communicate either directly or indirectly with any persons who were witnesses at his trial, or who have provided or who it is known to him will provide a statement in any form or an affidavit to either AIDWYC counsel, or their designate, or to the CCRG during the Ministerial Review, except through counsel. This condition exempts his surety Brenda Williams only;

(cc) he shall have no contact with sex trade workers;

(dd) he shall not associate with persons known to have a criminal record, except for immediate family and as may be incidental to employment or attending either the RCMP station for reporting or attending the bail supervision office for reporting or an appointment, and shall not associate with those known to him to be involved in criminal activity or have reason to believe are involved in criminal activity;

(ee) he shall not at any time be within the geographic area in his community of residence, bounded by the following street name coordinates: (the street names follow)

[…]

except:

(i) while travelling directly to and from the Bail Supervision Office […] or the […] RCMP […];

(ii) between 8:30 a.m. and 4:30 p.m. in the presence of a surety and while travelling directly to and from a scheduled medical or dental appointment;

(iii) between 8:30 a.m. and 4:30 p.m. in the presence of a surety and while travelling directly to and from government service offices for a specific purpose for example, to acquire personal identification and related documents;

(iv) subject to his curfew as set out in clause (1) (w), when in the presence of a surety he is attending at retail stores; or,

(v) with the specific permission of his bail supervisor.

(ff) if he obtains employment or changes employment, he must forthwith provide his bail supervisor with full details about the employment including the name of the employer, place of work and address, telephone number of the employer, hours of work, the nature of the position or work being done, and whether the work involves travelling to different sites or locations. When attending at the place of employment and travelling directly to or from employment, he must be in the primary place of residence as described in clause 1(h), by 10:00 p.m. Employment shall not interfere with any reporting or attendance and cooperation requirements for bail supervision or Forensic Psychiatric Services assessment, treatment and/or counselling as directed by his bail supervisor;

(gg) if he becomes self-employed, he must forthwith provide his bail supervisor with full details about his self-employment, including the name, place and nature of his self-employment, any telephone and mobile phone information to which he would have access, hours of self-

employment, motor vehicle information for any vehicles associated to or used in his self-employment, and whether the self-employment involves travelling to different sites or locations. When attending to his self-employment business and travelling directly to and from his self-employment business, he must be in the primary place of residence, as described in clause 1 (h), by10 p.m. His self-employment shall not interfere with any reporting or attendance and cooperation requirements for bail supervision or Forensic Psychiatric Services assessment, treatment and/or counselling as directed by his bail supervisor;

(hh) he must abide by all conditions of this Order whether employed, as set out in clause (ff), or self-employed, as set out in clause (gg);

(ii) if he abandons his s.696.1 **Criminal Code** application, he must surrender into […] custody […] within twenty-four (24) hours of filing the notification of his intention to abandon his application for Ministerial review with the Department of Justice Canada, Criminal Conviction Review Group;

(jj) upon notification that the Minister of Justice (Canada) will release his decision on the application pursuant to s.696.1 of the **Criminal Code**, he must surrender himself into the custody of the Sheriff or Deputy Sheriff at the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia, by no later than 10 a.m. on the day that the Minister's decision is issued;

(kk) upon notification that the Minister of Justice (Canada) has dismissed his application pursuant to s.696.1 of the **Criminal Code,** the Sheriff or Deputy Sheriff shall convey him to the Warden or his designate at the Central Nova Scotia Correctional Facility in Dartmouth, Nova Scotia;

(ll) upon notification by the Minister of Justice (Canada) that he has referred Glen Assoun's application, pursuant to s.696.1 of the **Criminal Code,** to the Nova Scotia Court of Appeal, or to the Supreme Court of Nova Scotia for a new trial, then Glen Assoun must have filed, by the date of the Minister's decision, a Notice of Motion for judicial interim release pursuant to either section 679 (3) or sections 515 and 522 of the **Criminal Code**, as the case may be and in accordance with *Civil Procedure Rules* and **Criminal Code** requirements;

IT IS FURTHER ORDERED THAT this Order for the release of Glen Eugene Assoun remains in full force and effect until such time as it is varied, in whole or part, by a court of competent jurisdiction.

[23] In addition, there is a further order the parties have proposed and which I will sign, that contemplates regular six month updates be provided to the Court and counsel in respect of Mr. Assoun's progress. Further, there will be an order emerging from my ruling earlier today on the relaxing of the publication ban.

Conclusion

[24] It is important to understand that the bail hearing in this case is not a retrial of Mr. Assoun. Rather, it is a process to assess risk, on the issue of whether Mr. Assoun should be detained on the basis of any of the three grounds set out in s. 679(3), discussed earlier. Having carefully considered the filed materials, submissions of counsel and the proposed Order, I am satisfied this is a case warranting judicial interim release such that Mr. Assoun should no longer be detained.

[25] In this application, I have been provided with affidavits together with voluminous materials comprising hundreds of pages along with discs of video and audio statements and interviews. Additionally, I have been provided with facta from the parties along with cases from Canadian superior courts and the Supreme Court of Canada. I venture to say that I have had cause to review all of what Mr. Green of the CCRG read before he authored the preliminary assessment. On the basis of my review of the material, I can certainly understand how Mr. Green reached the conclusion he did that, "… there may be a reasonable basis to conclude that a miscarriage of justice likely occurred…".

[26] In *R. v. Johnson* (1998), 131 C.C.C. (3d) 343 (N.S.C.A.), Freeman JA granted bail to Clayton Johnson when it appeared he might be in prison due to a miscarriage of justice. I find the words of Justice Freeman are of application in Mr. Assoun's case:

> "For present purposes, I am satisfied that [new] evidence, if found to be admissible, and if believed, could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The jury would have had a further option for resolving the narrow opportunity issue.

> The new expert reports, if admitted by the panel, would be cogent evidence in support of AIDWYC's contention that Mr. Johnson is "factually innocent", as he has maintained from the outset. It would be unrealistic to deny, that at the end of the day, there is at least a reasonable possibility that he has been wrongly convicted.
>
> If that should be the final outcome, *neither justice nor the public interest can be served by requiring him to remain in prison until the process has worked itself through what appears to be separate hearings in this court and possibly a new trial. As his counsel points out, the months unjustly taken from him, if he is innocent, can never be restored to him, but if at the end of the day he is still found to be guilty, they can be added to the time he must serve.* I find that Mr. Johnson's detention is not necessary in the public interest." (emphasis added)

[27] Mr. Assoun, it is because of what I have read – what was submitted to me under seal – that I want to address some closing comments directly to you. I know you have steadfastly maintained your innocence in the killing of Brenda Way. I wish you every opportunity as you continue in your quest to clear your name. Sixteen and two thirds years represents over a quarter of your lifetime – that is the amount of time you have been incarcerated until now. The world is a different place today than in 1998. You have the strength of resolve, the support of excellent lawyers and devoted family members. It is therefore my decision to accept the joint recommendation and grant you judicial interim release today.

Chipman, J.